Kluwer Arbitration Blog

Germany: Frankfurt Court Permits a Tribunal's Search for the Truth on the Internet

Moritz Schmitt (rothorn legal) · Wednesday, May 12th, 2021

"I want the truth! … You can't handle the truth!" – Hollywood's infamous shouting match in "A Few Good Men" may have forever ruined every client's expectation of a measured cross-examination. But the struggle to ascertain the truth remains real in international arbitration. Tribunals and counsel frequently face the tough question of what exactly they may, or must not, do on their quest for finding the truth. A decision of the Higher Regional Court Frankfurt from 25 March 2021 (26 Sch 18/20) now provides practical guidance.

An Austrian pharmaceutical company specialising in orphan drugs (i.e. drugs for the treatment of particularly rare diseases) had applied for an award to be declared enforceable. The dispute with the defendant, a Taiwanese biotech company, arose from a license and manufacturing agreement regarding a drug for rare forms of blood cancer. In the ICC arbitration, the applicant sought lost profits due to delays in the drug's approval and market entry. The tribunal found that the defendant had not validly terminated the agreement and ordered it to pay approximately €140 million in damages to the applicant.

In upholding the contested award, the Frankfurt court dismissed no less than seven allegedly grave violations of the defendant's right to be heard, instructively setting out the German courts' high standard of review: it is generally presumed that a tribunal has observed its duty to acknowledge and consider a party's submissions even if it does not expressly address all individual aspects. Where, however, a tribunal does not address the essential core of a party's submissions on an issue of central importance, there may be a violation, unless the tribunal deems that specific submission legally irrelevant or unsubstantiated.

Beyond that, the Frankfurt court's decision merits attention because it carefully balances competing considerations of the right to be heard and efficiently establishing the truth: How to deal with late submissions in post-hearing briefs? Is a tribunal permitted to search for information on the internet? At which point does assessing damages turn from a legal into a (forbidden) equitable decision?

"I want the truth!" … even if it arrives late

The defendant alleged that the tribunal violated the defendant's right to present its case when the

tribunal ordered that a recently surfaced report questioning the drug's added therapeutic benefit was not to be discussed at the hearing.

The court dismissed the defendant's allegation, emphasising that the right to be heard did not encompass the right to be heard at the earliest opportunity, as long as such opportunity was eventually provided. As directed by the tribunal, the parties addressed the contentious report in the two rounds of post-hearing briefs. The court found that the tribunal had thereby preserved the parties' right to be heard as well as the "equality of arms" principle, as the order had affected both parties in the same manner.

The defendant further argued that it should have been granted an opportunity to respond to a legal opinion on the contentious report, which the applicant had submitted with its rebuttal post-hearing brief.

The Frankfurt court held that it was not entitled to review whether the tribunal had wrongly admitted belated evidence. The court drew an analogy to a corresponding rule of civil procedure restricting such review of lower court judgments. The court explained the rationale for this analogy as follows: the admission of belated evidence serves the purpose of finding the truth; and the general interest in finding the truth trumps the general interest in observing procedural rules regarding delayed evidence. The court found that this reasoning should analogously apply to its review of the award, absent a divergent agreement of the parties.

At first sight, the court's analogy could be seen to invalidate cut-off dates, and as doing a disservice to efficiency: one party could be incentivised to make belated submissions to save its case at the final hour; the other party might do the same expecting that its opponent's belated evidence will not be struck.

But that is not the case: tribunals can address belated submissions with the tools already available to them, including rejecting any belated evidence. Yet, once belated evidence has been admitted, the reviewing state court cannot retroactively achieve the failed purpose of the delay rules. (Only) in this situation, the interest in a correct decision indeed outweighs adhering strictly to procedural timetables.

A more questionable aspect of the court's reasoning is its suggestion that parties can escape the analogous application of domestic procedural law by agreement. In fact, parties to an arbitration agreement consent to applying the *lex arbitri* (e.g. the 10th book of the German Code of Civil Procedure, ***GCCP***), but not other domestic civil procedure rules. It is thus neither legally necessary nor realistic that parties ever reach a more express agreement to not draw analogies. Ultimately, this additional safety valve provided by the court may be impractical, but it does not undermine an otherwise reasonable analogy.

"I want the truth!" … even if I have to search for it on the internet

Next, the defendant alleged that its right to be heard was violated because the tribunal had – more than a month after it had declared the proceedings closed (under Article 27(1) of the ICC Rules) – visited a website of a public health services association. In its damages assessment, the tribunal had then relied on information available on that website regarding "blended price"-calculations for

orphan drugs.

The court rejected this objection, citing the tribunal's mandate "to establish the facts of the case by all appropriate means" (Article 25 of the ICC Rules) and the tribunal's statutory discretion on procedural rules absent an agreement between the parties (Section 1042(4) 1st sentence GCCP). The court thus confirmed that the tribunal had the power to conduct investigations on its own volition. Emphasising that the defendant itself had referred the tribunal to the website in its submissions, the court pointed out that it was neither alleged by the defendant nor otherwise apparent that the website's content had changed in the meantime.

The court thereby affirms the power of tribunals to independently establish the facts, which is provided in many modern arbitration rules (*see* e.g. Article 28 DIS Rules), but is under-used and often overlooked. On close consideration, the Frankfurt court cannot be understood to have written a blank cheque for tribunals googling their reasonings on the internet. Where parties have not referred to a specific website, tribunals should carefully consider whether they need to reopen proceedings to allow parties to comment on their findings.

In fact, the defendant also complained that it had not been aware of the tribunal's independent investigation and was not given an opportunity to respond. The tribunal's damages determination should therefore be considered a "surprise decision" in violation of its right to be heard.

Again, the court was not sympathetic to the defendant's position: a surprise decision could only be assumed where the tribunal had – without prior notice – relied on an aspect that even a conscientious and knowledgeable litigant ought not have expected. Such a litigant had to anticipate that the tribunal could rely on the "blended price"-concept in determining damages, because the concept had recently been recognised by Germany's Federal Social Court.

Arguably, the reasoning by the Frankfurt court sets a high standard that requires counsel to be aware of all pertinent decisions by any of Germany's five highest federal courts. The court emphasised that this standard applies regardless of whether either party mentioned that jurisprudence in any submission. The decision thus serves as a reminder to counsel to comprehensively research all relevant jurisprudence (if need be, by engaging local counsel).

"I want the truth!" … I do not want any guessing

Finally, the defendant also argued that by arbitrarily estimating damages, the tribunal had unlawfully rendered a decision in equity (rather than law). While the defendant acknowledged that estimating damages was in principle permissible, the estimate had to be grounded on robust and verifiable data – which, in its view, was not the case.

Although the court acknowledged that the parties' express consent would be required to render an award based on equity (Section 1051(3) 1st sentence GCCP), it did not find the tribunal's damages assessment to be an equitable decision: by considering all pertinent circumstances and explaining its approach over 19 pages, the tribunal had properly exercised its discretion to engage in fact-finding (Section 1042(4) 2nd sentence GCCP) and ultimately rendered a legal decision.

The court pointed out that the tribunal had methodologically proceeded in accordance with the

corresponding rule of German domestic civil procedure that permits courts to estimate damages under certain circumstances (Section 287 GCCP). At the same time, the court confirmed that it was not entitled to further review whether the factual basis for estimating damages had been sufficient or whether the resulting damages were substantively correct.

By drawing this distinction, the court walked the fine line between the permissible review of unauthorised decisions in equity and the impermissible review of a tribunal's factual and legal assessment. The message to tribunals is thus clear: As long as damages assessments are diligently reasoned and guided by legal principles, they will not be set-aside as decisions in equity.

In summary, the Frankfurt court has not only provided helpful guidance to practical issues but reaffirmed its pro-arbitration stance in enforcement and set-aside matters – that some had doubted after its recent *obiter dictum* on dissenting opinions (see prior Kluwer Arbitration Blog posts). We will continue to report, as the defendant has appealed the decision to the Federal Supreme Court (I ZP 21/21).

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